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PASS TO THE US PATENT OFFICE FOR JAMES J. SHEEHAN

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TAGS: EIND, EEC

SUBJECT: COMMISSION FINDS PROPOSED CHANGES TO THE DRAFT EC PATENT
CONVENTION INCOMPATIBLE WITH THE ROME TREATY

REF: A. EC BRUSSELS 5177 B. EC BRUSSELS 3251 C. TRANSMITTAL
SLIP SPIRO-EUR/RPE MCCARTHY, MAY 12, 1975 D. EC A-340, SEPT-
TEMBER 5, 1973

1. BEGIN SUMMARY: THE COMMISSION, IN AN OPINION PUBLISHED RECENTLY
IN THE OFFICIAL JOURNAL, ALTHOUGH FAVORING SIGNATURE BY THE
MEMBER STATES OF THE COMMUNITY PATENT CONVENTION, CRITICIZED
SEVERL PROPOSED CHANGES TO THE DRAFT CONVENTION. THE CONVENTION IS
EXPECTED TO BE ADOPTED AT
A DIPLOMATIC CONFERENCE ON THE COMMUNITY PATENT TO BE HELD IN
LUXEMBOURG NOVEMBER 17-DECEMBER 15, 1975. THE COMMISSION FINDS
THAT THESE PROPOSALS, WHICH WOULD PERMIT A PATENT HOLDER TO PREVENT
PRODUCTS WHICH HE OR HIS LICENSEE HAS PUT ON THE MARKET IN ONE
MEMBER STATE FROM BEING SOLD IN ANOTHER MEMBER STATE, ARE
IN VIOLATION OF THE BASIC TREATY PRINCIPLES ON FREE CIRTULATION
OF GOODS WITHIN THE EC. IF THESE PROPOSALS ARE ADOPTED, THE
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COMMISSION THREATENS TO BRING ACTION IN THE EC COURT OF

JUSTICE. END SUMMARY.

2. BECAUSE OF THE LIGHT IT SHEDS ON EC COMMISSION THINKING ON THE LIMITS OF PATENT PROTECTION WHEN SUCH PROTECTION PREVENTS THE FREE MOVEMENT OF GOODS WITHIN THE EC, THE COMMISSION WOULD CALL THE DEPARTMENT'S ATTENTION TO THE EC COMMISSION'S OPINION ON THE DRAFT CONVENTION FOR THE COMMUNITY PATENT WHICH APPEARED IN THE OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES NO. L 26-26 DATED OCTOBER 9, 1975. (A COPY OF THE OPINION WAS SENT TO EUR/RPE BRESLER. THE OFFICIAL JOURNAL CAN BE FOUND IN EUR/RPE AND OPR/LR.)

3. IN ITS OPINION, THE COMMISSION FINDS CERTAIN PROPOSED AMENDMENTS INCONSISTENT WITH THE SPIRIT OF THE ROME TREATY AND UNDESIRABLE. IT FINDS OTHER PROPOSED AMENDMENTS AND A PROTOCOL INCOMPATIBLE WITH THE TREATY AND THEREFORE ILLEGAL.

4. THE COMMISSION HAD A HAND IN PREPARING THE DRAFT CONVENTION BUT MEMBER-STATE EXPERTS ALSO PARTICIPATED AND INTRODUCED THE CHANGES WHICH THE COMMISSION IS PROTESTING. THERE FOLLOWS A SUMMARY OF THE COMMISSION'S OPINION.

A) UNDESIRABLE AMENDMENTS

1) A PROPOSED ARTICLE (ARTICLE 84A) WOULD ALLOW AN APPLICANT FOR A EUROPEAN PATENT (AS OPPOSED TO A COMMUNITY PATENT, SEE REF D) DURING A TEN-YEAR TRANSITIONAL PERIOD, TO REFUSE A COMMUNITY PATENT WHICH WOULD COVER ALL NINE MEMBER STATES AND DESIGNATE THOSE MEMBER STATES IN WHICH HE WANTED A EUROPEAN PATENT. (THE EUROPEAN PATENT IS A BUNDLE OF NATIONAL PATENTS BUT ONLY A SINGLE APPLICATION FOR THE DESIRED NATIONAL PATENTS IS NECESSARY.) THE COMMISSION BELIEVES THAT WHEN APPLICATION IS MADE FOR A EUROPEAN PATENT IN WHICH A SINGLE MEMBER STATE IS DESIGNATED, A COMMUNITY PATENT SHOULD BE AUTOMATICALLY GRANTED WHICH WOULD APPLY TO ALL MEMBER STATES.

2) A NEW ARTICLE 84B PROVIDES THAT NATIONAL COURTS, RATHER THAN JUST THE EUROPEAN PATENT OFFICE, MAY DECIDE ON THE VALIDITY AND ULTIMATE CANCELLATION OF COMMUNITY PATENTS. THE COMMISSION FINDS THAT THIS WILL LEAD TO A SITUATION WHERE THE COMMUNITY PATENT, WHICH IS SUPPOSED TO RUN THROUGHOUT THE EC, LIMITED OFFICIAL USE

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MAY BE VALID IN ONE MEMBER STATE AND VOID IN ANOTHER.

B) INCOMPATIBLE PROPOSALS TO LIMIT ARTICLES 32 AND 78

1) THE PROPOSAL ON ARTICLE 32 PROVIDES THAT A PATENTEE IN A MEMBER STATE MAY PROHIBIT THE IMPORT OF GOODS WHICH HAVE BEEN PUT ON THE MARKET BY HIMSELF OR WITH HIS CONSENT IN A MEMBER STATE IN WHICH THE COMMUNITY PATENT, FOR ONE OF SEVERAL

REASONS, HAS NO EFFECT. THE COMMISSION REJECTS THE ECONOMIC ARGUMENTS ADVANCED TO SUPPORT THIS PROPOSAL CLAIMING THAT PARTITIONING OF THE EC MARKET, WHICH WOULD BE THE RESULT OF THE PROPOSAL, IS IN VIOLATION OF THE TREATY. FOR THE COMMISSION, FREE CIRCULATION OF GOODS MUST BE GUARANTEED WHETHER THE HOLDER OF A COMMUNITY PATENT PUTS PATENTED GOODS ON THE MARKET IN A MEMBER STATE IN WHICH HIS PATENT HAS NO EFFECT OR IN A STATE WHERE IT IS PROTECTED.

2) ARTICLE 78, AS WRITTEN IN THE DRAFT DIRECTIVE IS CONSIDERED BY THE COMMISSION AS BEING TOO LIMITED AND SHOULD BE EXTENDED. IT WOULD ALLOW, ACCORDING TO THE COMMISSION, PARTITIONING OF THE COMMON MARKET THROUGH THE ASSIGNMENT OF A NATIONAL PATENT TO A THIRD PARTY WHO IS ECONOMICALLY INDEPENDENT OF THE ASSIGNORS.

C) INCOMPATIBLE PROTOCOL
A PROTOCOL TO THE CONVENTION PROVIDES THAT CONVENTION ARTICLES (ARTICLES 32 AND 78), WHICH ARE INTENDED TO FORBID THE PARTITIONING OF THE MARKET, WOULD NOT BE APPLICABLE DURING A PERIOD OF UP TO TEN YEARS. THE COMMISSION ARGUES THAT THE PROTOCOL WOULD BE IN VIOLATION OF THE ROME TREATY ACCORDING TO THE HOLDINGS OF THE EUROPEAN COURT IN DEUTSCHE GRAMMOPHON AND STERLING DRUGS.

5. THE EC COMMISSION DIVISION CHIEF RESPONSIBLE FOR THE COMMUNITY PATENT (BRYAN HARRIS) TOLD US THAT THE COMMISSION'S OPINION IS A CLEAR WARNING THAT IF THE PROPOSALS IN VIOLATION OF THE TREATY OF ROME ARE NOT CHANGED, THE COMMISSION, WHICH SUPPORTS THE CONVENTION, WILL TAKE ACTION UNDER ARTICLE 169 FOR FAILURE TO OBSERVE THE TREATY. HE SAID THAT THESE PROPOSALS WILL BE DEBATED AT THE LUXEMBOURG DIPLOMATIC CONFERENCE (NOVEMBER 17 TO DECEMBER 15) AND ARE LIKELY TO BE ELIMINATED. THE CHANGES
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CONSIDERED OBJECTIONABLE, BUT NOT ILLEGAL, WILL PROBABLY REMAIN. REPRESENTATIVES OF THE EUROPEAN COURT OF JUSTICE AND A LARGE DELEGATION FROM THE COMMISSION'S LEGAL STAFF WILL ATTEND THE CONFERENCE. MORRIS

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